North Dakota Attorney General's LAW REPORT

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THIRD PARTY GUILT

In *Holmes v. South Carolina*, ____ U.S. ____ (2006), the court reversed Holmes' conviction of murder and other offenses, concluding that he had been deprived of his constitutional right to introduce proof of third party guilt upon the introduction of forensic evidence by the prosecution that, if believed, strongly supported the guilty verdict.

An 86-year-old woman was beaten, raped, and robbed in her home and she later died from her injuries. At trial, the prosecution relied heavily on forensic evidence that Holmes' palm print was found on the doorknob on the interior side of the victim's front door, DNA evidence, and fiber evidence. Evidence also was presented that Holmes had been seen near the victim's home within an hour of when the attack took place.

As a defense, Holmes tried to undermine the state's forensic evidence, suggesting it had been contaminated and that certain law enforcement officers had engaged in a plot to frame him. Defense experts criticized police procedures used in handling the fiber and DNA evidence and in collecting the fingerprint evidence. Another expert provided testimony, cited by Holmes as supporting his claim that the palm print had been planted by the police.

Holmes also sought to introduce proof that another named individual had attacked the victim. At the pretrial hearing, Holmes offered several witnesses who placed this person in the victim's neighborhood on the morning of the assault, as well as four other witnesses who testified this individual had either acknowledged Holmes was innocent or had actually admitted to committing the crimes. This individual testified at the pre-trial hearing and denied making numerous incriminating statements.

The trial court excluded Holmes' third party guilt evidence concluding there was strong evidence of Holmes' guilt and the evidence sought to be offered did not provide a reasonable inference as to Holmes' own innocence. Holmes could not overcome the forensic evidence against him to raise a reasonable inference of his own innocence.

In reversing the conviction, the court noted that state and federal rule makers have broad latitude under the constitution to establish rules excluding evidence from criminal trials but this latitude has limits. The Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation clauses of the Sixth Amendment guarantee defendants a meaningful opportunity to present a complete defense. This right is abridged by rules of evidence that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

The constitution prohibits the exclusion of defense evidence if the rules serve no legitimate purpose or are disproportionate to the ends they are asserted to promote. However, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. The constitution permits judges to exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues.

In this case, the court examined a South Carolina evidentiary rule and state cases that rules regulating the admission of evidence offered by criminal defendants to show that someone else committed the crime with which they are charged would not be admissible when there is strong evidence of a defendant's guilt, especially where

there is strong forensic evidence. In application of this evidentiary rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third party guilt, but looks to the strength of the prosecution's case. If the prosecution's case is strong enough, the evidence of third party guilt is excluded even if that evidence, viewed independently, would have great probative value and not pose an undue risk of harassment, prejudice, or confusion of the issues. This rule calls for little, if any, examination of the credibility of the prosecution witnesses or the reliability of its evidence.

The rule applied by the lower court in this case did not rationally serve the end it was designed to promote; to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to those issues.

The rule applied in this case appeared to be based on the logic that when it is clear only one person was involved in the commission of a particular crime and there is strong evidence the defendant was a perpetrator, it follows that evidence of third party guilt must be weak. However, this logic depends on an accurate evaluation of the prosecution's proof, and the true strengths of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence.

The rule applied in this case is no more reliable than its converse would be, such as a rule barring the prosecution from introducing at a pretrial hearing evidence of a defendant's guilt if the defendant is able to proffer evidence that, if believed, strongly supported a verdict of not guilty.

By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. The rule applied in this case was arbitrary because it did not rationally serve the end that third party guilt rules were designed to further. The rule applied in this case violated a criminal defendant's right to have a meaningful opportunity to present a complete defense.

SEARCH AND SEIZURE - EMERGENCY EXCEPTION

In *Brigham City, Utah v. Stuart*, ____ U.S. ____ (2006), the court confirmed the ability of a law enforcement officer to enter a home without a warrant when the officer has an objectively reasonable basis for believing an occupant is seriously injured or immediately threatened with such an injury.

Four police officers responded to a call regarding a loud party at a residence. Upon arriving the house, they heard shouting from inside and proceeded down the driveway to investigate. They observed two juveniles drinking beer in the backyard and saw, through a screen door and windows, an altercation taking place in the kitchen. Four adults were attempting with some difficulty to restrain a juvenile. The juvenile eventually broke free, swung a fist, and struck one of the adults in the face. The officer testified he observed the victim spitting blood into a nearby sink. The other adults continued to try to restrain the juvenile, placing him up against the refrigerator with such force the refrigerator began moving across the floor. At this point, an officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed and the officer entered the kitchen and again cried out. As the occupants slowly became aware the police were on the scene, the altercation ceased. After entering the residence, the defendant and others were arrested for various offenses.

A motion to suppress all evidence obtained after the officers entered the home was granted by the lower courts. The state appeals court concluded that the injury caused by the juvenile's punch was insufficient to trigger the emergency aid doctrine because it did not give rise to an objectively reasonable belief that an unconscious, semiconscious, or missing person feared injured or dead was in the home. The court also found the doctrine inapplicable because the officers had not sought to assist the injured adult, but, instead, had acted exclusively in their law enforcement capacity. The court also held the entry did not fall within the exigent circumstances exception to the warrant requirement .

In reversing the lower court, the Supreme Court recognized that searches and seizures inside a home without a warrant are presumptively unreasonable. However, because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions. Law enforcement

officers may make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in hot pursuit of a fleeing suspect. Warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.

The court recognized one exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. The need to protect or preserve life or avoid serious injuries is justification for what would otherwise be illegal, absent an exigency or emergency. Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The defendants asserted that the officer's entry was unreasonable because the officers were interested in making arrests rather than quelling violence and the officers' subjective motivations were relevant.

The court has repeatedly rejected these approaches. An action is reasonable under the Fourth Amendment regardless of the individual officer's state of mind as long as the circumstances, viewed objectively, justify the action. The officer's subjective motivation is irrelevant. It did not matter in this case, even if the officers subjective motives could be so neatly unraveled, whether the officers entered the kitchen to arrest the defendants and gather evidence against them or to assist the injured and prevent further violence.

The court also distinguished certain searches conducted without individualized suspicion such as checkpoints to combat drunk driving or drug trafficking. In these cases, an inquiry into the programmatic purpose is sometimes appropriate. However, this inquiry is directed at insuring that the purpose behind the program is not ultimately indistinguishable from the general interest in crime control. It has nothing to do with discerning what is in the mind of the individual officer conducting the search.

The defendant also claimed their conduct was not serious enough to justify the officers' intrusion into the home. As opposed to a potential emergency, in this case, the officers were confronted with an ongoing violence occurring within the home.

The court concluded the officers' entry was objectively reasonable under the circumstances. The officers responded at 3:00 a.m. to complaints about a loud party and saw a fracas taking place inside the kitchen. The officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment requires the officers to wait until another blow renders someone unconscious, semiconscious, or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties. An officer is not like a boxing or hockey referee poised to stop a bout only if it becomes too one-sided.

The manner of the officers' entry was also reasonable. After witnessing the punch, one of the officers opened the screen door and yelled that police were present. When nobody heard him, he stepped into the kitchen and announced himself again. Only then did the tumult subside. The officer's announcement of his presence was at least equivalent to a knock on the screen door and it was probably the only option that had even a chance of rising above the din. Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule and, once the announcement was made, the officers were free to enter. It would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

KNOCK-AND-ANNOUNCE RULE - VIOLATION NOT SUBJECT TO EXCLUSIONARY RULE

In *Hudson v. Michigan*, ____ U.S. ____ (2006), the court held that a violation of the knock-and-announce rule does not require suppression of evidence found in a search.

A search warrant was obtained authorizing a search for drugs and firearms at Hudson's home. When the police arrived to execute the warrant, they announced their presence but waited only three to five seconds before opening the unlocked front door and entering Hudson's home. Hudson

moved to suppress all evidence found, arguing that the premature entry violated his Fourth Amendment rights. Although the trial court granted his motion, the Michigan appellate courts held that suppression was inappropriate when entries were made pursuant to warrant but without a proper knock and announce before entry.

In affirming his conviction, the court recognized the common law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. In Wilson v. Arkansas, 514 U.S. 927 (1995), the court concluded that the knock-and-announce rule was a command of the Fourth Amendment. The court also recognized, however, that the new constitutional rule in Wilson was not easily applied. Both Wilson and later cases noted many situations in which it is not necessary to knock and announce. These situations include circumstances presenting a threat of physical violence, reason to believe the evidence would likely be destroyed if advance notice was given, or knocking and announcing would be futile. All the court has required is a reasonable suspicion under the particular circumstances that one of these grounds for failing to knock and announce exists. This showing is not high. When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few? The "reasonable wait" standard discussed in United States v. Banks, 540 U.S. 31 (2003), is necessarily vague.

In this case, the court was not required to determine whether the three to five second wait was reasonable, or if there was, in fact, a violation of the knock-and-announce rule. The state conceded the entry was a knock-and-announce violation. The only issue presented to the court was the remedy for that conceded violation. The court in Wilson specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement.

Weeks v. United States, 232 U.S. 383 (1914), adopted a federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. This same rule was applied to the states through the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961).

However, suppression of evidence has always been the court's last resort but not its first impulse. The exclusionary rule generates substantial social costs which sometimes includes setting the guilty free and the dangerous at large. The court has been cautious against expanding the exclusionary rule and repeatedly emphasized that the rule's costly toll upon truth seeking and law enforcement objectives presents a high obstacle for those urging its application.

The court has rejected indiscriminate application of the rule and has held it applicable only where its deterrence benefit outweighs its substantial social cost.

Although dicta in Mapp suggested a wide scope for the exclusionary rule, the court has long rejected that approach.

Exclusion may not be premised on the mere fact that a constitutional violation was a "but for" cause of obtaining evidence. The "but for" causality is only a necessary, not a sufficient, condition for suppression. In this case, the constitutional violation of an illegal manner of entry was not a "but for" cause of obtaining the evidence. Whether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained and would have discovered the gun and drugs inside Hudson's house. Even if the illegal entry could be characterized as a "but for" cause of discovering what was inside, the court has never held that evidence is fruit-of-the-poisonous-tree simply because it would not have come to light but for the illegal actions of the police. The court has not mechanically applied the exclusionary rule to every item of evidence that has a causal connection with police misconduct. Rather, "but for" cause or causation in the logical sense alone can be too attenuated to justify exclusion.

Attenuation can occur when the causal connection is remote. Attenuation also occurs, even given a direct causal connection, when the interests protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. The penalties visited upon the government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

Past cases of the court excluding the fruits of unlawful warrantless searches say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant is issued, citizens are entitled to shield their persons,

houses, papers, and effects from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different. They do not include shielding potential evidence from the government's eyes.

It has been recognized that interests protected by the knock-and-announce requirement include the protection of human life and limb because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. The knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. In addition, this rule protects those elements of privacy and dignity that can be destroyed by sudden entrance, by giving residents the opportunity to prepare themselves for entry by the police.

What the knock-and-announce rule has never protected is one's interest to prevent the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with seizure of the evidence, the exclusionary rule is inapplicable.

The court recognized that application of the exclusionary rule requires a balancing process. Apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs. In addition, another consequence of the remedy proposed by Hudson would be police officers refraining from timely entry after knocking and announcing since the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule are so massive, officers would be inclined to wait longer than the law requires thereby producing preventable violence against officers in some cases and the destruction of evidence in many others. In addition to the substantial social costs, the court considers the deterrent benefits, the existence of which is a necessary condition for exclusion of evidence. The value of deterrence depends upon the strength of the incentive to commit the forbidden act. From this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not have otherwise been obtained. Ignoring knock-and-announce realistically can be expected to achieve absolutely nothing except to prevent destruction of evidence and the avoid of life threatening resistance by occupants; dangers which, if there is even a reasonable suspicion of their existence, suspend the knock-and-announce requirement anyway.

Since Mapp was decided, civil remedies against federal, state, and local governments have expanded providing recourse for a knock-and-announce violation. Remedies are available to citizens that were not available to persons claiming constitutional violations when Mapp was decided. Civil liability is an effective deterrent to a knock-and-announce violation.

The social costs of applying the exclusionary rule to a knock-and-announce violation are considerable. The incentive to such violations is minimal to begin with, and the extant deterrences against them substantial, incomparably greater than the factors deterring warrantless entries when Mapp was decided. Resort to the massive remedy of suppression evidence of guilt is unjustified.

SUSPICIONLESS PAROLEE SEARCH

In *Samson v. California*, ____ U.S. ____ (2006), the court held that the Fourth Amendment does not prohibit the suspicionless search of a parolee.

California law required that every prisoner eligible for release on state parole must agree in writing to be subject to search or seizure by a parole or peace officer at any time of the day or night, with or without a search warrant, and with or without cause.

Samson was on state parole following a conviction for being a felon in possession of a firearm. A police officer observed Samson walking down a street with a woman and a child. Based on a prior contact with Samson, the officer was aware that Samson was on parole and believed that he was facing an at-large warrant. The officer stopped Samson and asked whether he had a outstanding parole warrant. Samson responded there was no outstanding warrant and that he was in good standing with his parole agent. The officer then confirmed by radio

dispatch that Samson was on parole and did not have an outstanding warrant. However, pursuant to California law and Samson's status as a parolee, the officer searched Samson, finding methamphetamine.

Samson was convicted of the offense and his conviction was affirmed by the state appeals court.

In affirming the California court and Samson's conviction, the court accepted review to answer a variation of the question that the court left open in United States v. Knights, 534 U.S. 112 (2001) -- whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by law enforcement officer would not offend the Fourth Amendment.

In Knights, the defendant was subject to a California probation condition much like that involved with Samson and his release on parole. Based on suspicion and pursuant to a search condition of this probation, a police officer conducted a warrantless search of Knights' apartment and found evidence of criminal offenses. The court concluded that the search of Knights' apartment was reasonable, and under the circumstances, Knights' expectation of privacy was significantly diminished. The court also concluded that probation searches, such as the search of Knights' apartment, are necessary to the promotion of legitimate governmental interests. Balancing the interests, the court further held when an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring and an intrusion on the probationer's significantly diminished privacy interest is reasonable.

The search at issue in Knights was predicated on both the probation search condition and reasonable suspicion. The court did not reach the question whether the search would have been reasonable under the Fourth Amendment had it been solely predicated upon the condition of probation; in other words, suspicionless search. The court directed its attention to that question in this case, although in the context of a parolee search.

Parolees are on the continuum of state imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers because parole is more akin to imprisonment than is probation. The essence of parole is release from prison before the completion of sentence on the condition that the prisoner abides by certain rules during the balance of the sentence. Parolees like Samson have severely diminished expectations of privacy by virtue of their status as parolees alone. Examining the totality-of-the-circumstances pertaining to Samson's status as a parolee, an established variation of imprisonment, and the plain terms of the parole search condition, the court concluded Samson did not have an expectation of privacy that society would recognize as legitimate.

By contrast, the state's interests are substantial. The state's ability to conduct suspicionless search of parolees serves its interest in reducing recidivism in a manner that aids, rather than hinders, the reintegration of parolees into productive society. The parole search law does not permit a blanket grant of discretion untethered by any procedural safeguards. Officers do not have unbridled discretion to conduct searches thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society. California prohibits arbitrary, capricious, or harassing searches. California law states that it was not the intent of the legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.

Whether a search is reasonable under the Fourth Amendment is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests. The Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.

CRAWFORD - 911 CALL - AFTER-THE-FACT STATEMENT

In *Davis v. Washington*, ____ U.S. ____ (2006), the court, in two consolidated cases, concluded that statements made during a 911 emergency call relating to events occurring at the time of that call were not testimonial but, in the second case, that an affidavit of a victim relating to past events was testimonial subject to the Sixth Amendment's

Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004).

In the 911 call case, the operator answered the initial call but the connection terminated before anyone spoke. The call was reversed by the operator and a woman answered. In the ensuing conversation, the operator determined the woman was involved in a domestic disturbance with her former boyfriend, Davis. As the conversation continued, the operator learned Davis had just run out the door after hitting the woman and he was leaving in a car with someone else. The operator then gathered more information about Davis. The woman described the context of the assault. Police were dispatched, arrived within four minutes of the 911 call, and observed the woman's shaken state, the fresh injuries on her forearm and her face, and her frantic efforts to gather her belongings and her children so they could leave the residence.

Davis was charged with a felony violation of a domestic no contact order. Over his objection at trial, the court admitted the recording of the woman's conversation with 911 operator. The officers testified to the woman's injuries but not as to the cause of the injuries. The woman could have testified as to whether Davis was her assailant but she did not appear.

The court began its discussion with Crawford v. Washington and the meaning of "testimonial statements." Only statements of this sort cause the declarant to be a witness within the meaning of the Confrontation Clause. The testimonial character of this statement separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

The court noted that Crawford set forth various formulation of the core class of testimonial statements but found it unnecessary to endorse any of them because some statements qualify under any definition. These statements include statements taken by police officers in the course of interrogations. Questioning that generated the deponent's statement in Crawford, which was made and recorded while she was in police custody after having been given Miranda warnings as a possible suspect herself, qualifies under any conceivable definition of an interrogation.

Without attempting to produce an exhaustive classification of all conceivable statements, or even all conceivable statements in response to police interrogation, as either testimonial or nontestimonial, the court found it sufficient to decide the present cases to hold as follows: Statements are "nontestimonial" when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to an ongoing emergency. They are "testimonial" when the circumstances objectively indicate there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.

In these cases, the issues to be resolved were testimonial hearsay and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in Crawford, if not explicitly held. The Crawford court stated the text of the Confrontation Clause reflects the focus on testimonial hearsay. It applies to witnesses against the accused -- in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or approving some fact. An accuser who makes a formal statement to government officers bears testimony in a way that a person making a casual remark to an acquaintance does not.

The court was unaware of any early American case invoking the Confrontation Clause or the common law right to confrontation that did not clearly involve testimony as thus defined. Well into the 20th century, Confrontation Clause jurisprudence was carefully applied only in the testimonial context.

Most American cases applying the Confrontation Clause or state constitutional or common law counterparts involve testimonial statements of the most formal sort - sworn testimony in prior judicial proceedings or formal depositions under oath - which invites the argument that the scope of the Clause is limited to a very formal category. However, the cases that were the origins of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions. In any event, the court did not believe it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant instead of having the declarant sign a deposition.

The question before the court relating to Davis was whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.

The court said in Crawford that interrogations by law enforcement officers solely directed at establishing the facts of a past crime in order to identify or provide evidence to convict the perpetrator fell squarely within the class of testimonial hearsay. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory, and perhaps notes, of an interrogating officer, was testimonial. A 911 call, on the other hand, and at the least the initial interrogation conducted in connection with the 911 call, is ordinarily not designed primarily to establish or approve some past fact but to describe current circumstances requiring police assistance.

The court recognized the difference between the interrogation in Davis and the one in Crawford as being apparent on its face. In the Davis case, the woman was speaking about events as they were actually happening rather than describing past events. The Sylvia Crawford interrogation, on the other hand, took place after the event she described had occurred. Any reasonable listener would recognize that the woman in the Davis case, unlike Sylvia Crawford, was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, the woman's call was plainly a call for help against a bona fide physical threat. In addition, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn, as in Crawford, what had happened in the past. That is true even if the operator established the identity of the assailant so that the dispatched officers might know whether they would be encountering a violent felon. Finally, the difference in the level of formality between the two interviews was striking. Sylvia Crawford was at the station house responding calmly to a series of questions with the officer-interrogator taping and taking notes of her answers. The woman's frantic answers in Davis were provided over the phone, in an environment that was not tranquil or even, as far as any reasonable 911 operator could make out, safe.

The court concluded that the circumstances of the woman's interrogation on the 911 call objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. Davis simply was not acting as a witness and she was not testifying. What she said was not a weaker substitute for live testimony. No witness goes into a court to proclaim an emergency and seek help.

The court did note, however, that a conversation which begins as an interrogation to determine the need for emergency assistance could evolve into testimonial statements, once that purpose has been achieved. In this case, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended when Davis drove away from the premises. The operator then posed a battery of questions. It could readily be maintained, from that point on, the women's statements were testimonial not unlike the structured police questioning in Crawford. This presented no great problem to the court the trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, the courts should redact or exclude the portions of any statement that will become testimonial as they do with unduly prejudicial portions of otherwise admissible evidence. In this case, Davis's jury did not hear the complete 911 call although it may well have heard some testimonial portions. The court was only asked to classify the woman's early statements identifying Davis in the 911 call as her assailant. The court agreed with the Washington appeals court that such statements were not testimonial. Even if the later parts of the call were testimonial, the admission was harmless beyond a reasonable doubt and Davis did not challenge that holding.

In the second case, arising from Indiana, police responded to a report of domestic disturbance at the home of Hammon. Hammon's wife was found alone on the front porch appearing frightened but stating nothing was the matter. She gave officers permission to enter the house where the officers saw a gas heating unit in the corner of the living room. There were pieces of glass on the floor in front of it and there were flames emitting from the broken glass front of the heating unit.

Hammon was in the kitchen. He told the police that he and his wife had been in an argument, everything was fine, and hat the argument never became physical. The officers then heard the wife's account and had her fill out and sign a battery affidavit. In the affidavit, she stated Hammon had shoved her down on the floor into

the broken glass, hit her in the chest, attacked her daughter, and engaged in other violent conduct.

Hammon was charged with domestic battery and violating his probation. The wife was subpoenaed but did not appear at the bench trial. The state called the officer who had questioned the wife and asked him to recount what the wife told him and to authenticate the affidavit. Over objection the affidavit was received but the trial court admitted the affidavit as a present sense impression and as excited utterances.

The court noted there was no emergency in progress and the interrogating officer testified he had heard no argument or crashing and saw no one throw or break anything. When the officer questioned the wife and elicited the challenged statements, he was not seeking to determine, as in Davis, what is happening but, rather, what had happened. Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.

The Crawford interrogation was more formal. It followed a Miranda warning, was tape recorded, and took place at the station house. While these features certainly strengthen the statements' testimonial aspect in that it made it more objectively apparent the purpose of the exercise was to nail down the truth about past criminal events, none was essential to the point. In the Indiana case, the wife's interrogation was conducted in a separate room away from her husband with the officer receiving her replies for use in his investigation. Both the Crawford and wife's statement deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. Both took place sometime after the events described were over. Such statements under official interrogation were an obvious substitute for live testimony because they did precisely what a witness does on direct examination. They are inherently testimonial.

The court did not hold in this case that no questions at the scene of a crime will yield nontestimonial answers. In prior cases, the court has observed of domestic disputes that in order to assess the situation, officers called to investigate need to know with whom they are dealing, the threat to their own safety, and possible danger to the potential victim. Such exigencies may often mean that initial inquiries produce nontestimonial statements. In the Indiana cases, however, where the wife's statements were neither a cry for help nor providing information enabling officers to immediately end a threatening situation, the fact that they were given at the alleged crime scene and were initial inquiries was immaterial.

Application of the Confrontation Clause, even to testimonial statements, has some limitations. Recognizing the court will not vitiate constitutional guarantees when they have the effect of allowing the guilty to go free, the Sixth Amendment does not require courts to acquiesce when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims. While defendants have no duty to assist the state in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system. The rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds. One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. The court took no position on the standards necessary to demonstrate such forfeiture but recognized that federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, generally hold the government to the preponderance of the evidence standard. State courts tend to follow the same practice. If a hearing on forfeiture is required, the court has observed that hearsay evidence, including the unavailable witness's out of court statements, may be considered. In the Indiana case, the court concluded that, absent a finding of forfeiture by wrongdoing by her husband, the Sixth Amendment operated to exclude the wife's affidavit. The Indiana courts, if they were asked, could determine on remand whether such a claim of forfeiture was properly raised and, if so, whether it was meritorious.

SIXTH AMENDMENT - COUNSEL OF CHOICE

In *United States v. Gonzalez-Lopez*, ____ U.S. ____ (2006), the court held that the trial court's refusal to allow defendant to be represented by counsel he hired was a deprivation of the Sixth Amendment right to counsel of choice and not subject to harmless error analysis.

The defendant hired an attorney to represent him in a drug case. The attorney filed a motion for

admission for local practice *pro hac vice*. The district court denied this application. A magistrate had previously revoked a provisional entry of appearance on the ground that the attorney, by passing notes to the local counsel, violated a court rule restricting the cross-examination of a witness to one counsel. The local counsel later filed a motion to withdraw and asserted that the out-of-state counsel hired by the defendant had violated a rule of professional conduct by communicating with the defendant when represented by the in-state counsel. The in-state counsel was allowed to withdraw from the case, and the district court explained that it denied the out-of-state counsel's admission *pro hac vice* primarily because the counsel had violated a rule of professional conduct by communicating with a represented party.

Another attorney was appointed to represent the defendant, the out-of-state counsel again moved for admission to appear, and this motion was denied. The out-of-state counsel was ordered to sit in the audience at trial and to have no contact with defendant's counsel during the trial. The defendant was able to meet the attorney only once, on the last night of trial. The defendant was found guilty.

The government did not dispute that the district court erroneously deprived defendant of his counsel of choice. The Sixth Amendment guarantees the defendant a right to be represented by an otherwise qualified attorney hired by that defendant or one who is willing to represent the defendant even though he is without funds. However, the government contended a Sixth Amendment violation is not complete unless the defendant can show that substitute counsel was ineffective within the meaning of Strickland v. Washington, 466 U.S. 668 (1984). In the alternative, the government also claimed the defendant must at least demonstrate that his counsel of choice would have pursued a different strategy creating a reasonable probability the result of the proceedings would have been different.

The court first noted the Sixth Amendment commands not that the trial be fair, but that a particular guarantee of fairness be provided in that the accused be defended by the counsel he believes to be the best. The right at stake in this case is the right to counsel of choice, not the right to a fair trial. The right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation complete.

The right to select counsel of one's choice has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. Where the right to be assisted by counsel of one's choice is wrongly denied, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise would confuse the right to counsel of choice (which is the right to a particular lawyer regardless of comparative effectiveness) with the right to effective counsel (which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed).

In rejecting the claim that any error was constitutionally harmless, the court noted it has divided constitutional errors into two classes. The first is called "trial error" because the errors occurring during the presentation of the case to the jury and the effect may be quantitatively assessed in the context of other evidence presented in order to determine whether the errors were harmless beyond a reasonable doubt. These include most constitutional errors. The second class of constitutional error is called "structural defects." These defy analysis of harmless error standards because they affect the framework within which the trial proceeds and are not simply an error in the trial process itself. These errors include denial of counsel, denial of the right of self-representation, denial of the right to public trial, and denial of the right to trial by jury by giving defective reasonable doubt instructions.

Erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the defense theory, jury selection, presentation of witnesses, and the style of witness examination and jury argument. The choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial. The erroneous denial of counsel bears directly on the framework within which the trial proceeds or on whether it proceeds

at all. It is impossible to know what different choices the rejected counsel would have made and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not concern the conduct of the trial at all. Harmless error analysis in this context would be a speculative inquiry into what might have occurred in an alternate universe.

The court noted that nothing casts doubt or places any qualification upon its previous holdings limiting the right to counsel of choice and recognizing the authority of trial courts to establish criteria for admitting lawyers to argue before them. The right to counsel of choice does not extend to defendants who require counsel to be appointed for them. Nor may a defendant insist on representation by a person who is not a member of the bar or demand that a court honor his waiver of conflict-free representation. The trial court also has a wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The court has an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. None of these limitations on the right to choose one's counsel is relevant in this case. This is not a case about a court's power to enforce rules, adhere to practices that determine which attorneys may appear before it, or to make scheduling or other decisions effectively excluding a defendant's first choice of counsel.

DURESS DEFENSE

In *Dixon v. United States*, ____ U.S. ____ (2006), the court rejected Dixon's claim that the government bore the burden of disproving her defense of duress beyond a reasonable doubt.

Dixon argued that the defense of duress controverted the *mens rea* required for a conviction and the Due Process Clause required the government to retain the burden of persuasion on that element.

Dixon was convicted of purchasing firearms while under indictment for a felony. When the firearms were purchased, Dixon provided an incorrect address and falsely stated she was not under indictment.

At trial, Dixon admitted she knew she was under indictment when she made the firearm purchases and that it was a crime. Her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him. The crimes for which Dixon was convicted require that she acted knowingly or willfully. Dixon claimed she could not have formed the necessary *mens rea* for these crimes because she did not freely choose to commit the acts in question. Even if the court assumes that Dixon's will was overborne by the threats made against her and her daughters, she still knew she was making false statements and that she was breaking the law by buying the firearms.

The duress defense, like the defense of necessity, may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself. Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully. Rather, the duress defense allows a defendant to avoid liability because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.

The fact that Dixon's crimes are statutory offenses with no counterpart in common law also supports the court's conclusion that her duress defense in no way disproves an element of those crimes. Congress defined the firearm crimes to punish defendants who acted knowingly or willfully. It is these specific mental states, rather than some vague "evil mind" or "criminal intent," the government is required to prove beyond a reasonable doubt. No constitutional basis exists for placing upon the government the burden of disproving Dixon's duress defense beyond a reasonable doubt.

At common law, the burden of proving "affirmative defenses" rested on the defendant. This common law rule is in accordance with the general evidentiary rule that the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party. In the context of the defense of

duress, it accords with the doctrine that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.

In footnotes to this case, the court noted there is no federal statute defining the elements of the duress defense and that duress is an excuse that allows an exception from liability. The rationale of the duress defense is that the defendant ought to be excused when the defendant is the victim of a threat which a person of reasonable moral strength could not fairly be expected to resist.

INSANITY TEST

In *Clark v. Arizona*, ____ U.S. ____ (2006), the court upheld that due process is not violated by the use of an insanity test stated solely in the terms of the capacity to tell whether an act was right or wrong, eliminating its significance directly on the issue of the mental element (*mens rea*) of the crime charged.

Clark killed a police officer. It was undisputed at trial that Clark suffered from paranoid schizophrenia at the time of the incident. He denied he had a specific intent to shoot a law enforcement officer, or knowledge that he was doing so. The prosecutor offered circumstantial evidence that Clark knew the deceased was a law enforcement officer, showing the officer was in uniform, in a marked police car with emergency lights and siren going, when he caught up with Clark, and that Clark acknowledged the symbols of police authority by stopping. Testimony was also presented that Clark had intentionally lured an officer to the scene to kill him.

At trial, Clark presented testimony under his affirmative defense of insanity that at the time of the commission of the criminal act he was afflicted with a mental disease or defect of such severity that he did not know the criminal act was wrong and, further, the evidence was offered to rebut the prosecution's evidence of the required *mens rea*, that he had acted intentionally or knowingly to kill the law enforcement officer. The trial court refused to allow Clark to rely on evidence bearing on insanity to dispute the *mens rea*. Clark was convicted.

In affirming the convictions, the court rejected Clark's claim that Arizona's definition of insanity violated due process.

The insanity defense of Arizona was originally based upon the M'Naghten rule. This is a two-part insanity test -- first, whether a mental defect leaves a defendant unable to understand what he is doing and second, whether a mental disease or defect leaves a defendant unable to understand that his action was wrong.

When Arizona first codified an insanity rule, it adopted the full M'Naghten rule. In 1993, the legislature dropped the first part, leaving only proof of whether a mental disease or defect left a defendant unable to understand that his action was wrong.

Clark challenged the 1993 amendment excising the express reference to the first part of the M'Naghten test, whether a mental defect leaves a defendant unable to understand what he is doing. He claimed the M'Naghten test represented the minimum a government must provide in recognizing an alternative to criminal responsibility on the grounds of mental illness or defect.

In rejecting this claim, the court noted history showed no deference to the M'Naghten test that would elevate its formula to the level of fundamental principle so as to limit the traditional recognition of a state's capacity to define crimes and defenses. A cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them. No particular formulation has evolved into a baseline for due process, and the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Neither in theory nor practice did Arizona's limitation of the insanity defense deprive Clark of due process.

Clark also contended the limitation of his ability to present evidence showing he suffered from a mental disease and lacked capacity to form a *mens rea* was relevant to rebut evidence that he did, in fact, form the required *mens rea* at the time of the crime.

This right to introduce relevant evidence can be curtailed if there is a good reason for doing it. While the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to

the ends they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. Under the Arizona rule, mental disease and capacity evidence is channeled or restricted to one issue and given effect only if the defendant carries the burden to convince the fact finder of insanity.

The question is whether reasons for requiring the evidence to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires. The court stated the reasons met due process considerations.

Arizona has authority to define its presumption of sanity by choosing an insanity definition and by placing the burden of persuasion on defendants who claim incapacity as an excuse from customary criminal responsibility. The state has the authority to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of a criminal trial. The presumption of sanity would be only as strong as the evidence a fact finder would accept as enough to raise a reasonable doubt about *mens rea* for the crime charged. Once reasonable doubt is found, acquittal is required, and the standards established for the defense of insanity would go by the boards.

A state is free to accept such a possibility in its law. It is free to define the insanity defense by treating the presumption of sanity as a bursting bubble whose disappearance shifts the burden to the prosecution to prove sanity whenever a defendant presents any credible evidence of mental disease or incapacity. The legislature may well be willing to allow such evidence to be considered on the *mens rea* element for whatever the fact finder thinks it's worth. What counts for due process, however, is simply that a state wishing to avoid a second avenue for exploring capacity has a good reason for confining the consideration of evidence of mental disease and incapacity to the insanity defense. The Arizona rule reflects such a choice. The state had declined to adopt a defense of diminished capacity. The state's choice would be undercut if evidence of incapacity could be considered for whatever a jury might think sufficient to raise a reasonable doubt about *mens rea* even if it did not show insanity. If a jury were free to decide how much evidence of mental disease and incapacity was enough to counter evidence of *mens rea* to the point of creating a reasonable doubt, that would be analogous to allowing jurors to decide upon some degree of diminished capacity to obey the law, a degree set by them, that would prevail as a stand-alone defense. The court also found a potential for mental disease evidence to mislead jurors through the suggestion that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity when that may not be a sound conclusion at all.

Characteristics of mental disease and capacity evidence may give rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which the defendant has the burden of persuasion. The court looked to the controversial character of some categories of mental disease, the potential of mental disease evidence to mislead the jury, and the danger of according greater certainty to capacity evidence than experts claim for it. The difficulty of assessing the significance of mental disease evidence supports the state's decision to channel such expert testimony to consideration on the insanity defense on which the party seeking the benefit of the evidence has the burden of persuasion. The state of Arizona had sensible reasons to assign the risks as it had done by channeling the evidence to the insanity defense only. The rule served to preserve the state's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of the jurors. This limitation on the use of the evidence at trial did not violate due process.

POST-CONVICTION RELIEF - RES JUDICATA - JUROR SELECTION

In *Flanagan v. State*, 2006 ND 76, 712 N.W.2d 602, the court affirmed a denial of Flanagan's post-conviction relief application.

Flanagan was charged with gross sexual imposition for engaging in sexual contact with a person less than 15 years of age. He appealed his conviction and, in State v. Flanagan, 2004 ND 112, 680 N.W.2d, 241, he argued that the state and federal constitutions required the state to

prove each element of the charge beyond a reasonable doubt, relating to a jury instruction regarding proof of the victim's age. In his post-conviction relief application, rather than reasserting his constitutional arguments, he claimed that N.D.C.C. § 12.1-01-03(1) prohibits a person from being convicted of an offense unless each element is proved beyond a reasonable doubt. He argued in the post-conviction relief proceeding that he was entitled to greater statutory protections under state law and it was obvious error to fail to instruct the jury on the issue. Flanagan further argued that the statutory right was not addressed in his direct appeal from his conviction.

Rejecting his claim, the court concluded that, although Flanagan's argument was couched in terms of a greater statutory right, his claim was merely a variation of the argument the court rejected in his direct appeal and the argument was res judicata.

Flanagan also claimed that he received ineffective assistance of counsel.

After rejecting his assertion that he was entitled to greater protection for claims of ineffective assistance of counsel under the state constitution than under the federal constitution, the court applied the Strickland v. Washington, 466 U.S. 668 (1984) two-part test in evaluating Flanagan's ineffective assistance of counsel claims.

Flanagan asserted his trial counsel failed to interview or investigate the proposed testimony of his youngest step-daughter and, if counsel had done so, he would have discovered the youngest step-daughter who testified at trial learned information about the victim's lack of truthfulness from his oldest step-daughter. The oldest step-daughter did not testify at trial and an effort to introduce hearsay testimony of the oldest step-daughter through the youngest step-daughter was rejected by the trial court.

The burden of establishing grounds for post-conviction relief rests upon a petitioner and a petitioner has a heavy burden to prevail on a post-conviction claim for ineffective assistance of counsel. In this case, the oldest step-daughter did not testify at the post-conviction hearing and Flanagan testified he did not know how his oldest step-daughter would have testified but could only speculate regarding her testimony about the complainant's honesty. Flanagan asked the district court to consider that his oldest step-daughter would have testified complainant was untruthful. The credibility of the complainant was an important issue in the case but Flanagan only offered speculation to show a probability sufficient to undermine the confidence in the outcome of the jury verdict. Even if trial counsel failed to interview the youngest step-daughter and this failure fell below an objective standard of reasonableness, Flanagan did not meet his heavy burden to establish a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

The court also rejected Flanagan's argument that his trial counsel's failure to object to the prosecution's use of gender-based peremptory challenges constituted ineffective assistance of counsel. The jury that convicted Flanagan consisted of 12 women. Flanagan used five peremptory challenges to strike five men from the jury, the state used six peremptory challenges to strike five men and one woman from the jury. Flanagan argues the state removed two men from the jury without talking to them or asking them questions. The state removed the last available man from the jury for no apparent reason. Flanagan argued given the nature of the state's voir dire and how the peremptory strikes were exercised, the record presented an inference that the state's use of peremptory challenges was based on gender and, but for his counsel's failure to object to the jury selection process, it would not have withstood judicial scrutiny.

The Equal Protection Clause forbids use of peremptory challenges to exclude jurors solely on the basis of their gender or race. In a post-conviction proceeding challenging trial counsel's method of jury selection, counsel's actions during voir dire involve matters of trial strategy. In post-conviction proceedings claiming ineffective assistance of counsel, other courts have deferred to trial counsel's tactical decision regarding gender-based preemptory challenges and jury selections, declining to second guess trial counsel stating that counsel may have had sound strategic reasons for not opposing the state's preemptory challenges where counsel may have been satisfied that the selected jury was a fair cross section of the community and the defendant's chances for a favorable outcome would not improve with any changes and may instead lessen. The court agreed with that rationale because it was consistent with its recognition that counsel's actions during voir dire may involve matters of trial strategy. The court declined to second guess a seasoned defense

counsel on matters implicating trial strategy and agreed with the district court's conclusion that the decision about jury selection was a reasonable decision and did not fall below an objective standard of reasonableness.

SEARCH AND SEIZURE – CONSENT- MIRANDA

In *State v. Genre*, 2006 ND 77, 712 N.W.2d 624, the court affirmed the defendant's convictions of drug offenses, concluding that searches yielding what was used against the defendant were the result of a valid consent.

The defendant was stopped for speeding. Upon approaching the vehicle, a deputy saw a rifle lying on the back seat and an open container of alcohol in the vehicle's console. The deputy detected the odor of alcohol coming from the vehicle and observed that the defendant had blood shot eyes and appeared to be nervous. The deputy asked the defendant to exit the vehicle and asked the defendant if he could search the defendant and his vehicle. The defendant responded "sure, go ahead."

During the search, the deputy found a piece of tin foil containing a white residue in the defendant's pants pocket and the defendant told him there were coffee filters under the back seat in a yellow bag. The deputy did not advise the defendant he was under arrest but placed him in the squad car. The deputy searched the vehicle seizing drugs, paraphernalia, beer, and a rifle.

When the defendant was told he was going to jail, the defendant requested to speak to the state's attorney. At the police department, the state's attorney arrived and the defendant was immediately given the Miranda warning. The defendant stated he understood his rights, did not request an attorney, and gave a voluntary statement admitting that the coffee filters contained methamphetamine and he had been smoking methamphetamine earlier in the evening. He also described how he acquired the filters.

During the meeting it was agreed the defendant would not go to jail that night because he gave some information and was considering working with law enforcement by participating in controlled purchases of drugs. The defendant claimed the state's attorney told him he could not be charged if he provided information and participated in some controlled buys.

Three days later, the defendant met with the deputy and a BCI agent, but the state's attorney was not present. The agent told the defendant he did not have authority to make a plea agreement but could make recommendations for sentencing. The defendant was again informed he did not have to speak to the officers and was given the Miranda warning. The defendant gave a statement. Four weeks later the defendant met with another BCI agent to discuss working as a confidential informant. About the same time, the defendant's attorney contacted the state's attorney to reach a formal plea agreement. The state's attorney later testified that a formal agreement was never reached.

At a later meeting with a BCI agent, the defendant admitted to recently using methamphetamine and the agent told the defendant he believed the defendant had illegal narcotics in his vehicle and in his hotel room at a casino. The agent asked the defendant for consent to search the defendant's hotel room and told the defendant he would be detained until a search warrant was obtained. The defendant gave consent both verbally and in writing to the search. Drugs and paraphernalia were found in the hotel room but the defendant was not arrested or charged at that time.

The defendant claimed the searches of his person, vehicle, and hotel room were invalid because he did not give a valid consent to search.

After stopping the vehicle, the deputy saw a rifle and an open beer can in the vehicle. The open can of beer was a violation of the open container law and the deputy observed the odor of alcohol coming from the vehicle and that the defendant had bloodshot eyes and appeared to be nervous. These observations were sufficient to create a reasonable suspicion that criminal activity was afoot to justify expanding the scope of the stop. The defendant's continued seizure was not unreasonable.

Warrantless seizures are unreasonable unless they fall within a recognized exception to the warrant requirement. Consent is one exception to

the warrant requirement. Under the standard of review for motions to suppression, the court will defer to the district court's finding of fact and resolve conflicts and testimony in favor of affirmance. The district court found the deputy asked for and the defendant consented to the search of both his person and the vehicle. The evidence supported the district court's conclusion that the defendant consented to both searches. In this case, the defendant did not merely acquiesce to the officer's authority but instead gave explicit consent.

The defendant also claimed that the stop went beyond a traffic stop when the deputy asked the defendant to exit his vehicle, began questioning him, and asked to search the defendant and his vehicle. The Defendant claimed his fifth amendment right against self-incrimination was violated when the deputy questioned him during the stop without giving him Miranda warning.

An officer is required to administer the Miranda warning when a person is subject to custodial interrogation. The suspect is in custody when there is a formal arrest or restraint on the suspect's freedom of movement to the degree associated with a formal arrest. When determining if a person is subject to custodial interrogation, the court examines all circumstances surrounding the interrogation and considers how a reasonable man in the suspect's position would have understood his situation. Whether a suspect is in custody and entitled to a Miranda warning is a mixed question of law and fact and is fully reviewable on appeal.

An individual detained during a routine traffic stop generally is not in custody for purposes of Miranda. Ordering a driver out of the vehicle for officer safety or to issue a citation is reasonable and does not result in custodial interrogation. In this case, the defendant was not in custody for purposes of Miranda during the traffic stop. The deputy saw a rifle lying on the backseat of the vehicle and did not know if the rifle was loaded. The deputy's request that the defendant leave his vehicle was reasonable and did not transform the stop into a custodial interrogation.

During a traffic stop, a driver should reasonably expect to answer common sense investigatory questions. Questioning during a traffic stop does not become a custodial interrogation simply because the officer asks a question that may establish an element of a crime. The deputy detected the odor of alcohol upon approaching the vehicle and observed the defendant's appearance. The defendant could reasonably expect to answer investigatory questions regarding alcohol consumption. The deputy also saw an open can of beer and a rifle in the vehicle. The defendant could reasonably expect to answer questions regarding those items as well.

Under these circumstances, a reasonable person in the defendant's position would not believe that exiting his vehicle and answering general investigatory questions was a restraint on his freedom of movement to the degree associated with a formal arrest. The defendant was not subject to custodial interrogation. Miranda did not apply.

The court also rejected the claim that the search of the defendant's vehicle and his hotel room on a later date was invalid because his consent was involuntary.

Prior to the consent, the defendant was advised that he must be truthful if he wanted to work for law enforcement. At that time he confessed to recently using methamphetamine. The BCI agent asked if he could search the defendant's hotel room and the defendant consented after he was told that he would be detained until a warrant was obtained. The defendant was informed of charges if officers found anything illegal during the search and the search was to help the defendant to get clean so he could work with law enforcement. The consent was provided both verbally and in writing.

Consent is an exception to the warrant requirement. The consent must be voluntary. Voluntariness is a question of fact resolved by the trial court but the court on appeal will show great deference to the trial court's determination of voluntariness. The burden of proof is on the state to prove consent was voluntary.

Consent is voluntary when it is the product of a free and unconstrained choice and not the product of duress or coercion. Whether consent is voluntary depends upon the totality-of-the-circumstances.

Considering all of the facts, the trial court found the consent to be voluntary. Telling the defendant that he will be detained until a search warrant is obtained does not automatically invalidate a consent. The trial court concluded that the officers were not unreasonably coercive although it found the officers implied promises of leniency if the defendant gave consent did weigh in favor of

involuntariness. The court found the officer's nonconfrontational attitude was intended to induce consent but did not amount to coercion. The defendant's will was not overborne at the time of giving consent and the confession was not the product of coercion. The trial court's finding that the consent was voluntary was supported by sufficient competent evidence.

The defendant also claimed that the statements he made to the state's attorney and the investigating officers were made during a plea negotiation and were inadmissible under N.D.R.Crim.P. 11. To determine whether a discussion constitutes plea negotiation, the court must consider the totality-of-the-circumstances and apply a two-tiered analysis. The court must first determine whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion. And, if that is the case, the court must determine whether the expectation was reasonable given the totality of objective circumstances. The court must distinguish between those discussions in which the accused was merely making an admission and discussions in which the accused was seeking to negotiate a plea agreement.

Upon reviewing the facts, the court determined that serious doubt was raised whether the defendant subjectively believed he had reached a formal plea agreement with the state's attorney. Even if he did subjectively believe he was engaged in a plea negotiations during the meetings, that belief was unreasonable. When determining whether a suspect's belief is reasonable, a court considers factors such as whether the suspect was in custody or charged with the crime and whether there was any discussion of pleas or charges. Numerous other factors are considered as well including whether normal plea discussion events occurred such as a specific plea offer being made, a deadline to plead is imposed, an offer to drop specific charges is made, sentencing guidelines are discussed, and a defense attorney is retained to assist in the formal plea bargain process. The meeting with the state's attorney involved only general sentencing discussions and not plea negotiations. Defendant's admissions were made as a part of an arrangement to keep the defendant out of jail that night and not as a part of the plea negotiation. N.D.R.Evid. 410 rendering inadmissible evidence or statements in connection with a plea of guilty or an offer to plead guilty, did not apply. This rule only applies to statements made in connection with, and relevant to, the withdrawn plea of guilty or an offer to plead guilty. It does not apply to offers to cooperate. It was unreasonable for the defendant to believe that he was engaged in plea negotiations during his later meetings with law enforcement officers. At each of these meetings the officers informed the defendant he did not have to speak to them. They did not have the authority to offer him a plea agreement. No pleas or charges were discussed and the defendant did not offer to plead guilty to any charge.

CLERICAL ERROR IN JUDGMENT

In *State v. Wheeler*, 2006 ND 95, ____ N.W.2d ____, the court rejected the defendant's claim that the district court's judgments of conviction were unlawful because the judgments stated the defendant entered a plea of guilty when he was actually found guilty by a jury. Even though the defendant did not enter a plea of guilty, the judgments were not unlawful. Rejecting the defendant's claim, the court noted that N.D.R.Crim.P. 36 authorizes the district court to correct a clerical error in a judgment, order, or other part of the record, or to correct an error in the record arising from oversight or omission. The clerical error in the judgments appeared to be an oversight by the district court and may be corrected.

DUI - LAWYER CONTACT

In *State v. Pace*, 2006 ND 98, 713 N.W.2d 535, the court affirmed the defendant's conviction of DUI.

The defendant was stopped on suspicion of driving under the influence. After failing several field sobriety tests and a preliminary breath test, the defendant was arrested, advised of his Miranda rights, and placed in the backseat of a police car. The arresting officer asked the defendant for consent to a blood draw at a hospital to determine his blood alcohol content. The defendant responded that he did not know

how to answer that and asked if he could speak to his attorney.

The defendant provided the name of the attorney and the attorney's law firm. The officer contacted police dispatch for the phone number of the firm. The officer called the firm but reached an answering machine and told the defendant he had been unable to reach the defendant's attorney and asked how he wished to proceed. The defendant asked what his options were. The officer then repeated that the defendant could consent to or refuse the blood draw and briefly explained the potential consequences of each. The officer stated that he needed a yes or a no answer and, after a brief discussion, the defendant consented to a blood draw. No mention of an attorney was made by either the defendant or the officer after the failed attempt to contact the defendant's attorney.

The defendant moved to dismiss the charges or to suppress the chemical test results on the basis he was denied access to an attorney after one was requested. This motion was denied.

In affirming the trial court, the court confirmed that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a chemical test. The defendant argued that a phone and directory must be made available to a defendant if that defendant indicates any desire for counsel prior to submitting to a chemical test whether that defendant ultimately consents to, or refuses, the test. The court disagreed. Although a defendant has a reasonable opportunity to consult with an attorney upon request, the court has not established a definition for "reasonable opportunity." It would not do so in this case. Rather, the court objectively reviews the totality-of-the-circumstances to determine whether an opportunity to consult with counsel was reasonable. This flexible, dynamic standard has resulted in decisions favoring both sides of the "reasonable opportunity" argument.

In this case, the defendant requested contact with "his attorney." The officer located the firm's telephone number and used a cell phone at the arrest site to call the firm. When that attempted contact failed, the defendant suggested no other avenues for contacting his attorney nor did he make any further request for that or any other attorney.

Although the officer did present the defendant with an ultimatum at this time, telling the defendant he needed a yes or no answer on the blood draw, the court did not find it to be per se unreasonable. Taking into account that the officer assisted the defendant in attempting to contact his attorney and the defendant made no further request for an attorney, the court could not conclude that the defendant was denied a reasonable opportunity to consult with counsel.

PRESERVATION OF EVIDENCE - JUDGMENT OF ACQUITTAL

In *State v. Haibeck*, 2006 ND 100, 714 N.W.2d 52, the court reversed the trial court's order dismissing charges against the defendant after the state inadvertently destroyed physical evidence.

Following a traffic stop, the defendant was charged with four counts of possession of drugs and drug paraphernalia. In an earlier appeal, State v. Haibeck, 2004 ND 163, 685 N.W.2d 512, the court reversed a trial court order granting the defendant's motion to suppress evidence and remanded the matter for further proceedings. On remand, during the final pre-trial conference in chambers on the morning of the jury trial, the state informed the court and defendant's counsel that the physical evidence the state had intended to present had been destroyed. This evidence consisted of a quantity of marijuana and methamphetamine, and a razor blade and pipe both alleged to contain drug residue. After announcing the evidence had been inadvertently destroyed because the case was old, the state said it was prepared to go forward with the case and presented a lab report, testimony from the arresting officer, and the results of the lab report in support in its case. The defendant's counsel immediately moved for judgment of acquittal. In support of the motion, the defendant's counsel cited the right to confront, right of due process, fair trial, and general constitutional grounds.

After argument by counsel for both sides but without briefing on the issue, the trial court said it was granting the motion dismissing all four counts, went into open court, called in the jury, and ordered dismissal. The trial court stated a person has a right to be confronted with all the evidence against them and that the defendant would be deprived of her Sixth Amendment Confrontation Clause rights if the trial went forward.

In dismissing the charges, the trial court erred as a matter of law. The court has never applied a Sixth Amendment Confrontation Clause analysis to the state's destruction of evidence.

The court, however, has examined what evidence is required to implicate a due process violation when potentially useful evidence has been destroyed. Unless a criminal defendant can show bad faith on the part of the police, the failure to preserve potentially useful evidence does not constitute a denial of due process of law. This is the federal constitutional test for evidence that is potentially useful as compared to evidence that is plainly exculpatory. The defendant admitted there was no evidence of bad faith by the police when the evidence was destroyed. Under the United States Constitution, there was no violation of her due process rights. The trial court erred in concluding otherwise.

The defendant also claimed the North Dakota Constitution affords greater protection than the federal constitution in this area. The defendant did not raise the issue of the North Dakota Constitution at trial nor were the protections afforded by the North Dakota Constitution the basis for the trial court's decision. The court will not consider an argument that is not adequately articulated, supported, and briefed.

After learning the evidence had been destroyed, the defendant moved for a judgment of acquittal under N.D.R.Crim.P. 29(a). The rule authorizes the motion for judgment of acquittal after the evidence is closed if the evidence is insufficient to sustain a conviction. Since the motion was made and granted before the state had the opportunity to present its case, the trial court committed error in granting the motion.

The court also rejected a claim that N.D.R.Crim.P. (12)(b) could be used to support a motion for acquittal as a pretrial motion. A pretrial motion to dismiss cannot be converted into a summary trial of evidence thereby depriving the fact finder, whether jury or judge, of its exclusive function of determining factual questions which have a bearing on the defendant's guilt or innocence. In this case, the trial court went beyond the face of the information and therefore a dismissal under Rule 12(b) would also have been in error.

APPEAL BY STATE

In *State v. Grager*, 2006 ND 102, 713 N.W.2d 531, the court dismissed appeals brought by the state relating to granting orders dismissing prosecutions.

A search warrant was issued and executed at defendants' residence. The defendants filed motions to suppress. An order was issued granting the motions and suppressing all evidence found as a result of the search. After the July 20, 2005, suppression orders, the state, on August 12, 2005, moved to dismiss the case stating it had insufficient evidence to prosecute the cases after the evidence seized during the search was suppressed. On August 17, 2005, the district court granted the state's motions and dismissed the prosecutions without prejudice. On August 18, 2005, the state appealed both the order suppressing the evidence and the orders dismissing the prosecutions.

The court concluded it did not have jurisdiction to hear the state's appeals. N.D.C.C. § 29-28-07 authorizes appeals by the state. The state argues that it may appeal the order to dismiss under N.D.C.C. § 29-28-07(1). The state may appeal an order to dismiss under this subsection because the dismissal has the same effect as an order to quash and, in both cases, the order vacates, annuls or makes void indictment, information, or complaint. In cases involving the appealability of dismissal orders, the district court has ordinarily ordered dismissal on its own motion or at the defendant's request. In this case, the state sought the orders for dismissal. An order to dismiss without prejudice entered at the state's request is different from an order to dismiss entered on the court's own volition or at the defendants' request. In the first instance, the state is actually withdrawing its case, in these conditions, the court is rendering a decision on its own motion or at the defendant's request, either of which would vacate, annul, or void the prosecution. The order to dismiss at the request of the state does not have the same effect as an order to quash.

It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party. In this case, the state moved to dismiss the cases without prejudice stating that the state lacked sufficient evidence to prosecute the cases because the

order granting the motion to suppress. The state cannot complain on appeal about the district court's order dismissing the cases when the state requested the dismissals. Therefore, N.D.C.C. § 29-28-07(1) does not apply and the state may not appeal the orders.

The court concluded that the issues involving the suppression order, which might otherwise be appealed under N.D.C.C. § 29-28-07(5), were moot because the state requested the district court dismiss the cases and it cannot appeal those dismissals. When it becomes impossible for the court to issue relief, no controversy exists and the issue is moot. The court will not render advisory opinions and will dismiss an appeal if the issue becomes moot. The suppression issue was moot because the cases have been dismissed and the state cannot appeal the dismissals.

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Roth v. State*, 2006 ND 106, 713 N.W.2d 513, the court reversed the trial court's denial of Roth's application for post-conviction relief.

Roth appealed his conviction of drug offenses and these convictions were affirmed. After conclusion of his appeal, Roth filed an application for post-conviction relief alleging numerous grounds, including several grounds that were determined in the direct appeal of his convictions. However, he also raised an ineffective assistance of counsel claim that was not addressed in the direct appeal.

The trial court denied Roth's post-conviction relief application concluding that the application raised issues beyond those addressed in his previous direct appeal.

The court agreed that matters relating to denial of Roth's motion to suppress evidence addressed in the direct appeal precluded him from raising these issues relating to issuance and execution of the search warrant directly in the post-conviction relief application. These issues were either addressed or forgone in his direct appeal.

However, Roth's claim of ineffective assistance of his trial and appellate counsel had never been addressed.

In a claim for ineffective assistance of counsel, it is the defendant's burden to prove both that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. The trial court's determination that all of the issues Roth raised in his application for post-conviction relief had already been raised in his previous appeal was error. Roth had not previously raised an issue of ineffective assistance of his trial and appellate counsel. He could not have raised the issue in his previous proceedings in the direct appeal because his claim related not only to this trial counsel but his counsel for his direct appeal. Because the trial court erroneously found that Roth's ineffective assistance of counsel claim was misuse of process, the merits of his two arguments of why his counsel was ineffective were not reached.

An ineffective assistance of counsel claim should be made in an application for post-conviction relief so that an evidentiary record can be made, allowing scrutiny of the reasons underlying counsel's conduct. Because the trial court dismissed Roth's application for misuse of process, the trial court never considered whether an evidentiary hearing was required. However, Roth never claimed he was entitled to an evidentiary hearing and never requested one. He argued that the record established his counsel was plainly defective and an evidentiary hearing was not needed. Roth claimed the affidavit in support of the search warrant that resulted in his charges was enough to establish ineffective assistance of counsel. In this case, the trial court never reviewed the affidavit to determine if it provided probable cause to support a nighttime search. There was never a determination whether failure to raise lack of probable cause for a nighttime search constituted ineffective assistance of counsel. Roth should have had the opportunity to have the merits of his ineffective assistance of counsel claim considered by the trial court. The merit of Roth's claim, that had counsel raised the issue of lack of probable cause to support a nighttime search there was a reasonable probability the evidence against him would have been suppressed, was never considered. The matter remanded for consideration of Roth's claim of ineffective assistance of counsel.

CREDIT FOR TIME SERVED IN CUSTODY

In *Gust v. State*, 2005 ND 114, 714 N.W.2d 826, the court affirmed an order denying the defendant's application for post-conviction relief in which Gust sought credit for 203 days time served rather than the nine days of time served entered in the criminal judgment.

On May 18, 2004, Gust was arrested for drug offenses. At the time of his arrest, Gust was on parole from an earlier offense. On May 19, 2004, Gust made his initial appearance and bond was set at $10,000. Gust did not post bond and remained in custody. ON May 27, 2004, Gust's parole was revoked, and Gust began serving time for his parole revocation. In December of 2004, Gust pled guilty to drug offenses and received credit for nine days served for the period between his arrest on May 18, 2004, until his parole revocation on May 27, 2004.

Gust filed an application for post-conviction relief arguing he should be entitled to credit for time served in the amount of 203 days and that he received ineffective assistance of counsel because his attorney did not request a credit for time served. This application was denied.

A defendant has the burden showing he is entitled to additional credit for time served in custody. A criminal defendant must be credited for time served in custody but a defendant is not credited for time spent in custody for a wholly unrelated charge.

For purposes of crediting time spent in custody, N.D.C.C. § 12.1-32-02(2) refers to "conduct on which such charged was based." "Such charge" refers to the "charge for which the sentence was imposed." It is inappropriate to receive credit on a sentence following a probation revocation relating to an earlier criminal conviction and receive additional credit for separate criminal offenses because the two charges are for separate conduct. Gust is entitled to credit for the nine days he was incarcerated before his paroled was revoked. The trial court correctly gave Gust credit for this time. From May 27, 2004, until December 9, 2004, Gust was in custody for his parole revocation. To grant Gust credit for time served in both cases would constitute double credit.

POST-CONVICTION RELIEF - LACHES

In *Johnson v. State*, 2006 ND 122, 714 N.W.2d 832, the court affirmed an order dismissing Johnson's application for post-conviction relief.

Johnson entered a plea of guilty to endangering by fire after the North Dakota State Hospital conducted a forensic evaluation finding that he was fit to proceed in the case. Nine years after entering the plea of guilty, Johnson applied for post-conviction relief arguing that his counsel's representation was ineffective because his attorney did not request an independent mental evaluation. The state moved to summarily dismiss the petition and that motion was granted by the district court. The order granting the motion was reversed on appeal to permit Johnson an opportunity to respond to the state's motion.

After remand, Johnson responded to the state's motion for summary dismissal. The state also moved at that time to amend its response to Johnson's petition claiming laches as a defense to Johnson's petition. The district court granted the state's request to amend its response and then dismissed the petition for post-conviction relief.

In affirming the order granting the amendment to the motion and dismissal of the petition, the court recognized that post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. N.D.R.Civ.P. 15(a) provides that a party's pleading may be amended only by leave of court or by written consent of the adverse party, but leave will be freely given when justice so requires.

N.D.R.Civ.P. 8(c) provides for the affirmative defense of laches. Laches is a delay or lapse of time in commencing an action that works to a disadvantage or prejudice to the adverse party because of change in conditions during the delay. A post-conviction relief application can be filed at any time. However, although laches may not be considered a defense to a constitutional attack of a conviction, long delays maybe considered when deciding whether a defendant's claims have a merit. The literal reading of N.D.C.C. § 29-32.1-03(2) allows a post-conviction petitioner to file an application at any time. However, an application may be denied if it is untimely.

Although the statutes governing post-conviction procedures do not provide for a time bar allowing outright dismissal of an application for post-conviction relief, N.D.C.C. § 29-32.1-03(2) does not bar denial of an application if it is the product of undue delay.

The court reviewed decisions of other jurisdictions that have applied either laches or a diligence rule to post-conviction cases. A laches defense alone does not destroy legitimate post-conviction applications for convictions occurring many years in the past because laches requires more than mere delay. The state must prove, by a preponderance of the evidence, that the petitioner unreasonably delayed seeking relief and the delay has prejudiced the state. The petitioner can seldom be found to have unreasonably delayed unless he or she has knowledge of a defect in the conviction. With prejudice, the state must show it is unlikely to be able to reprosecute. Prejudice exists when the unreasonable delay operates to materially diminish a reasonable likelihood of successful reprosecution. The inability to reconstruct a case against a petitioner is demonstrated by unavailable evidence such as destroyed records, deceased witnesses, or witnesses who have no independent recollection of the event. The state has no obligation to use due diligence in its investigation of the availability of evidence and witnesses.

Laches prevents a litigant from raising issues the litigant unreasonably delayed claiming through a failure to exercise due diligence. The logic of preventing claims that are stale because of undue delay is implicit in N.D.C.C. § 29-32.1-12(2) which provides for the misuse of process affirmative defense. Laches and misuse of process both require a litigant to raise issues in a proper, timely fashion.

Laches is a proper defense to prevent abuse of post-conviction proceedings. Laches is a defense the state may use in defending against applications for post-conviction relief. For this defense to prevail, the state must prove by a preponderance of the evidence that the petitioner unreasonably delayed seeking relief and that the delay has prejudiced the state. To the extent that the court's past cases hold to the contrary, including State v. O'Neill, 117 N.W.2d 857, 863 (N.D. 1962), they are overruled.

In this case, Johnson waited 8½ years to challenge his guilty plea claiming ineffective assistance of counsel. He waited another half year before challenging his plea as not having been made intelligently, knowingly, and voluntarily. Johnson knew his mental condition was an issue at the time he pled guilty but delayed bringing his application for 8½ years and the state met the first prong of laches, unreasonable delay as a result of Johnson's lack of diligence.

In addition, the record reflected that the judge who took the plea and sentenced Johnson in 1996 had died and the doctor who performed the psychiatric evaluation was no longer available. The state's ability to defend against the petition for post-conviction relief and potentially against an insanity defense at trial has been materially diminished and the state has been prejudiced. The trial court did not abuse its discretion by allowing the state to amend its answer to allege the defense of laches and did not abuse its discretion when it denied Johnson's motion to amend his petition as untimely.

RELEVANT EVIDENCE - NECESSITY DEFENSE

In *State v. Manning*, 2006 ND 125, _____ N.W.2d _____, the court affirmed the defendant's conviction of disobedience of a judicial order.

The defendant was divorced from his wife in May 2002. The parties were granted split physical custody of their two children. This arrangement quickly deteriorated and each party sought sole custody of the children.

In May 2004, the district court amended the divorce judgment granting the mother sole physical custody of both children with a visitation schedule for the defendant. In August 2004, while exercising visitation, defendant took the children to Canada without permission. He was charged with removing a child from the state in violation of a custody decree.

In March 2005, the defendant moved the court to allow a justification or excuse defense to allege the defense of necessity. The state moved to exclude a large share of defendant's proposed trial evidence, arguing evidence of past child abuse allegedly committed by the mother prior to March 2004 was irrelevant.

The district court allowed the necessity defense in this case but excluded any evidence relating to alleged child abuse on or before March 30, 2004, the last day evidence was heard in the custody dispute. The trial court held the evidence prior to that date was irrelevant for the criminal offense which allegedly took place in August 2004.

On appeal, the defendant argued the district court abused its discretion when it excluded his evidence of child abuse occurring before March 30, 2004, because it was relevant to his necessity defense.

A trial court is granted broad discretion when deciding whether evidence is relevant and the supreme court will not reverse the trial court unless that court has abused its discretion. A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law.

Although the broad notion of necessity has not been recognized by the court, the district court held that the defendant was entitled to present evidence relevant to the defense and could have the jury instructed on the defense if he could present sufficient evidence. Much of the proffered evidence consisted of 186 exhibits predating March 30, 2004, the last day evidence was heard on the change of custody motions. The district court held that it would allow evidence dated after March 30, 2004, upon proper foundation but excluded any evidence before that date because it had already been considered in the child custody case and would only serve to confuse the issues and mislead the jury.

The district court considered evidence of alleged abuse predating March 30, 2004, in the civil custody case finding the mother had not abused the children, granted physical custody to her. The district court in the criminal case admitted the amended divorce judgment as evidence but not the order in which the court considered the custody motions finding that no abuse had occurred. The defendant may not have agreed with the custody court order and judgment but he could not disobey its order and judgment simply because he believed the order and judgment were erroneous.

The trial court allowed exhibits containing allegations of abuse occurring after March 30, 2004, and prior to the defendant taking the children to Canada. These exhibits struck at the heart of the issue as to whether the defendant was justified or excused in taking his children to Canada rather than returning them to their mother because it was the lesser of two evils.

Although the district court excluded much of the evidence allegedly supporting the defendant's necessity defense, the trial court allowed information that would have potentially supported the defense. The court weighed the competing interests and came to a solution that kept the exhibits timely and relevant while still allowing the defendant to present his defense. The district court did not abuse its discretion by acting arbitrarily, unreasonably, or capriciously. The court did not misapply or misinterpret the law. Whether necessity is a valid defense in North Dakota was not addressed by the court.

GSI - VIDEOTAPE INTERVIEW OF CHILD VICTIM - CRAWFORD

In *State v. Blue*, 2006 ND 134, ____ N.W.2d ____, the court reversed the defendant's conviction of gross sexual imposition finding that the admission of a videotaped interview of a child victim was a testimonial statement. Since the child was able to testify and the videotape was played without the defendant having opportunity to cross-examine the witness, the defendant's constitutional right under the Sixth Amendment to confront his accuser was violated.

A mother brought her four-year-old daughter to a hospital. She believed the child had been sexually abused by her boyfriend, the defendant. After finding medical confirmation of the claim, the child was referred to the Children's Advocacy Center, where a forensic interviewer conducted a videotaped interview of the child. The child told the forensic interviewer the defendant had locked the door and put scissors inside her when her pants and panties were off. The videotaped recording was given to an officer, and the defendant was later charged with gross sexual imposition.

At an evidentiary hearing before trial, the child was placed on the stand to determine whether she could testify at trial. The child verbally answered some questions but also nodded her head "yes" and shook her head "no" to other

questions. The court issued an order allowing the use of the videotape at trial, concluding that the child was an unavailable witness due to her lack of memory. The videotaped interview of the child was received into evidence and shown to the jury. The child did not testify in front of the jury. The jury also received photographs of the child and the medical report following the incident. The defendant was convicted of gross sexual imposition.

In reversing the defendant's conviction, the court examined Crawford v. Washington, 541 U.S. 36 (2004), and later cases, including Davis v. Washington, ____ U.S. ____ (2006), to determine whether the videotaped interview was testimonial subject to the Sixth Amendment confrontation rights.

The court also examined other state court decisions, examining the context and circumstances in which a statement is made to determine whether the statement was testimonial. An out-of-court statement by a victim to a friend, family member, co-worker, or non-governmental employee without police involvement has been held to be non-testimonial. An interview done strictly for medical purposes and not in anticipation of criminal proceedings would also be considered non-testimonial. However, if a statement is made as a part of an investigation by government officials, the statement is generally considered testimonial. The fact that the questioner is a government officer is highly probative of the questioner's purpose. The involvement of government officials would often lead an objective witness to believe the statement would be available for use at a later trial.

In cases since Crawford, other states with the functional equivalent of the Children's Advocacy Center involved in this case have held that similar statements made by a child with police involvement inevitably are testimonial. The court agreed with the majority of jurisdictions that have dealt with a similar factual scenario. In this case, the videotape of the child's statement to the forensic interviewer was testimonial as defined under Crawford. The statement was made with police involvement. Statements made to non-government questioners acting in concert with, or as an agent of, the government are likely testimonial statements under Crawford. Although the Davis court declined to consider the precise nature of when statements made to someone other than law enforcement personnel are testimonial, the forensic interviewer in this case was either acting in concert with, or as an agent of, the government and the court also found it unnecessary to decide the precise scope of the question. The court looks to the purpose of the questioner.

The forensic interviewer's purpose was undoubtedly to prepare for trial. Forensic by definition means "suitable to courts." The police involvement also adds to the testimonial nature of the interview. An officer viewed the interview in another room and received the videotape immediately after the interview was conducted. Police involvement under these facts indicates the purpose of the interview was in preparation for trial.

Because there was no ongoing emergency and the primary purpose of the videotaped interview was to establish or prove past events potentially relevant to a later criminal prosecution, the court held that the videotape recording constituted a testimonial statement.

However, determining the statement was testimonial did not end its constitutional inquiry. The court recognized that a testimonial statement can still be admitted into evidence provided the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

The district court analyzed the case under the guidelines laid down pre-Crawford. The district court's opinion on the admission of the videotape was filed nearly a year after Crawford was issued. Neither party argued Crawford applied at the district court. The defense counsel objected to the admission of the videotape at trial based on the defendant's right to confront a witness under the constitution. The district court, while not mentioning Crawford, found the child to be unavailable due to her lack of memory.

The district court erred as a matter of law in determining the child was unavailable and that reliability and trustworthiness can supersede the constitutional demand of confrontation. Although the court found the witness to be unavailable under N.D.R.Evid. 804(a)(3), the reliability and trustworthiness factors found in pre-Crawford cases were created in reliance upon Ohio v. Roberts, 448 U.S. 56 (1980). The reliability and trustworthiness factors are still to be used for non-testimonial statements. When testimonial statements are in issue, the constitutional right to confrontation cannot be superseded by reliability and trustworthiness.

The district court applied the pre-Crawford guidelines for admission of the evidence as set forth in State v. Hirschkorn, 2002 ND 36, 640 N.W.2d 439, and State v. Messner, 1998 ND 151, 583 N.W.2d 109. To the extent that these cases contradict the holding in Crawford v. Washington, they are overruled.

The court also rejected the state's suggestion that the evidentiary hearing provided the defendant with a sufficient opportunity to cross-examine the child. If a defendant has an opportunity to cross-examine the witness at trial, the admission of testimonial statements would not violate the Confrontation Clause. The core constitutional problem is eliminated when there is confrontation. Where a defendant has a same or similar motive to cross-examine a witness, the opportunity to cross-examine a witness before trial can satisfy the Confrontation Clause. The opportunity to cross-examine a witness refers to the time the prior statement, now sought to be introduced at trial, was made. The Confrontation Clause reflects a preference for face-to-face confrontation at trial because it is the literal right to confront the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause. However, this does not mean a right to cross-examination in whatever way the defense might wish.

At the evidentiary hearing to determine the child's reliability, the child sat on her mother's lap and was asked a series of questions by the state and by the district court judge. The child did not verbally answer whether she knew the defendant. The child simply shook her head. No questions were asked by the defendant. The state argued that the opportunity to cross-examine a witness should include a witness's mere presence at a preliminary hearing. The court rejected a strained reading of Supreme Court precedent, concluding that a witness's mere appearance at a preliminary hearing was not adequate opportunity for cross-examination for purposes under the Confrontation Clause. This did not mean, however, that the videotaped statement of the child is completely inadmissible. The videotaped statement can still be admissible under N.D.R.Evid. 803(24)(b)(i) provided the child testifies at trial. In this case, the district court's pre-trial order eliminated the need for the state to call the witness and precluded the defendant from even attempting to call his accuser at trial. Because of this, the defendant did not have an adequate opportunity to cross-examine his accuser.

The court also rejected any claim that admission of the videotaped testimony in this case was harmless error beyond a reasonable doubt. The videotape was a central piece of evidence before the jury. If the videotape was not allowed into evidence, the jury would not have seen the child and the conviction would have been based on hearsay statements from other people.

The court found it unnecessary to address the constitutionality of N.D.R.Evid. 803(24)(b)(ii), authorizing the admission of a child's statement about sexual abuse when unavailable as a witness. Both parties agreed the rule was unconstitutional as it related to testimonial statements. The court found it unnecessary to address its application to non-testimonial statements.

DISORDERLY CONDUCT - SELF-DEFENSE INSTRUCTION

In *State v. Gresz*, 2006 ND 135, ____ N.W.2d ____, the court affirmed the defendant's conviction of disorderly conduct.

The defendant claimed Ed Praus and other members of his family had broken into her house and car to steal her property and that they sold her property at auction which required her to buy her property back.

During a community event for numerous people, the defendant, in a loud voice, shouted obscenities at Ed Praus. Other testimony was presented that for a year and a half the defendant had been disruptive at auctions conducted by Praus, calling him names and accusing him of stealing property from her.

After conviction for disorderly conduct, the defendant claimed the district court committed obvious error by not including a jury instruction on self-defense. At no time during the proceedings did the defendant object to the instructions given to the jury.

If there is evidence to support a self-defense claim, the accused is entitled to an instruction on it. Jury instructions must correctly and adequately inform the jury of the applicable law. To preserve an appellate challenge to a jury instruction, a party must specifically object to a court's proposed instruction. The failure to adequately preserve an issue for review limits an inquiry as to whether the trial court's failure to instruct the jury was obvious error affecting substantial rights.

The court could not say the trial court committed obvious error by failing to include a jury instruction for self-defense. This defense requires some physical action. At oral argument, defendant argued force for self-defense purposes can be brought about by words alone. Rejecting this claim, physical action in the self-defense context upon another person is a requirement of force. Even shouted words would not meet the common understanding of the statutory definition of "force." The defendant did not allege physical action was used by either party. Without a showing of physical action upon another person, the court could not say that failure to instruct the jury on self-defense was error, let alone obvious error.

INVESTIGATORY STOP

In *Johnson v. Sprynczynatyk*, 2006 ND 137, ____ N.W.2d ____, the court held that driving under the speed limit late at night was insufficient to provide reasonable suspicion to support an investigatory stop.

At approximately 12:43 a.m., an officer observed Johnson traveling 8-10 miles per hour in a 25-mile-per-hour speed zone. After following the vehicle for two blocks, the officer stopped the vehicle based on its slow speed. The officer observed no erratic driving or other indications of suspicious behavior from the driver of the vehicle. Although the administrative hearing officer in a driver's license suspension hearing found that the stop was reasonable, the district court reversed the hearing officer's decision finding that the officer did not have the required reasonable and articulable suspicion to stop Johnson's vehicle. Johnson's driving privileges were reinstated.

In affirming the district court, the court noted the Department of Transportation conceded there was no minimum speed limit on the road where Johnson was stopped. The only evidence presented to support the DOT's argument was that the officer saw Johnson operating his vehicle at 8-10 miles per hour in a 25-mile-per-hour zone. No other vehicles were impeded by Johnson's slow speed.

The court rejected the claim that the totality of the circumstances, the slow speed coupled with the fact that the stop was made around 12:43 a.m., provided the required reasonable and articulable suspicion of illegal activity.

People travel on roadways at all hours of the day, and it is not unusual for people to be traveling at 12:43 a.m. It is logical that drivers may reduce their speeds when traveling in the dark. These two non-suspicious factors, even when taken together, did not provide the required reasonable and articulable suspicion to justify stopping Johnson's vehicle. Arguably, there may be a case in which the traveling speed is so slow so as to, by itself, create a reasonable and articulable suspicion to stop a vehicle. The circumstances surrounding this stop did not provide that case. Johnson was driving 8-10 miles per hour in town in a 25-mile-per-hour zone. It is not unusual to encounter a vehicle driving through a residential or densely populated area at similar speeds which are slower than the posted speed limit.

SEARCH AND SEIZURE - REASONABLE EXPECTATION OF PRIVACY - STANDING

In *State v. Oien*, 2006 ND 138, ____ N.W.2d. ____, the court affirmed the defendant's conviction of various drug offenses.

The defendant's girlfriend rented an apartment from the Cass County Housing Authority. Police were called to the girlfriend's apartment after the girlfriend and the defendant were involved in a domestic dispute. As a result of the incident, the property manager for the Housing Authority sent a no trespass order to the police department indicating the defendant was not allowed on Housing Authority property, including his girlfriend's apartment. At the suppression hearing, evidence was received that the girlfriend's lease contained a provision allowing the Housing

Authority to exclude individuals from the property and failure to comply with the provision could result in termination of the lease. In addition, the property manager for the Housing Authority gave the girlfriend verbal and written notice the defendant was not allowed on the property. A copy of the written notice was sent to the defendant at his mother's residence. The girlfriend testified she did not inform the defendant he was not allowed on Housing Authority property because she wanted him to continue to come to her apartment, and also the defendant would stay at his mother's residence or with friends when he did not stay with her.

The property manager received an anonymous tip the defendant was in his girlfriend's apartment. The manager and two officers went to the girlfriend's apartment. The manager asked the girlfriend if the defendant was in the apartment and, although initially saying no, when asked again she hesitated when answering. The property manager twice asked the girlfriend if they could search the apartment for the defendant. The girlfriend said no both times. The property manager asked a third time to search the apartment and told the girlfriend she would be evicted if she did not allow the search. The girlfriend then consented to the search.

The apartment was searched and the defendant was found hiding in the closet. When the defendant was removed from the closet, the officer noticed the smell of marijuana, looked in the closet, and saw a metal cake pan containing marijuana.

The defendant moved to suppress all of the evidence, arguing that the entry and warrantless search of his girlfriend's apartment were illegal. The district court denied the defendant's motion finding the defendant did not have standing to challenge the entry and search because he was trespassing and the officers were performing a caretaking function.

On appeal, the court rejected the claims that defendant had standing to challenge the entry and search of the residence asserting that he was an overnight guest in the apartment and entitled to the protections of the Fourth Amendment.

An individual is only entitled to the protection of the exclusionary rule if the individual's own Fourth Amendment rights were violated and not the rights of a third party. The capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims that protection has a reasonable expectation of privacy in the invaded place. Although the court no longer makes a determination of whether the individual has standing in the traditional sense, the term continues to be used to refer to the concept of reasonable expectation of privacy.

A Fourth Amendment search does not occur unless the government violates an individual's subjective expectation of privacy that society has recognized as reasonable. A guest generally has a reasonable expectation of privacy in a host's home. Although a guest generally has a reasonable expectation of privacy on the premises, someone who is trespassing or has been legitimately expelled from the premises searched does not have an expectation of privacy that society recognizes as reasonable. It would be irrational to say that society recognizes as reasonable an individual subjective expectation of being free from police intrusion upon his privacy in a place after he has been legitimately excluded from that place.

Although the defendant claimed he was an overnight guest at the girlfriend's apartment and had a reasonable expectation of privacy, the district court found the defendant was trespassing. Whether the defendant was trespassing is a question of fact and the court will defer to the trial court's findings of fact unless the findings are clearly erroneous. The district court's findings that the defendant was a trespasser were supported by the evidence. Although the defendant may have been an overnight guest, he was not entitled to the Fourth Amendment protections because he did not have a reasonable expectation of privacy in his girlfriend's apartment after he became aware the landlord legitimately forbad him from being on Housing Authority property.

APPEAL BY STATE - CONSTITUTIONALITY OF BAIL CONDITION - EFFECT OF PLEA OF GUILTY AND SENTENCE

In *State v. Hansen*, 2006 ND 139, ____ N.W.2d ____, the court dismissed the appeal by the state of a district court order declaring N.D.C.C. § 19-03.1-46 unconstitutional but also exercised its supervisory authority in vacating the district court's order.

At a bail hearing, the district court raised the issue of constitutionality of N.D.C.C. § 19-03.1-46, setting forth a procedure for drug testing when imposing bail conditions for persons who have been charged with certain drug offenses. The district court issued an order on the same day as the bail hearing. The order declared N.D.C.C. § 19-03.1-46 unconstitutional without prior notice to the state's attorney or attorney general and without briefing by the parties. No drug testing condition was imposed a requirement of bail but the defendant was never released on bail, having subsequently entering a plea of guilty to three of four drug charges and receiving a sentence for those offenses.

The state appealed the district court order finding N.D.C.C. § 19-03.1-46 unconstitutional. On appeal, the court concluded that the state's appeal was moot because the defendant had pled guilty, had been sentenced to the offenses, and had not been released on bail before he entered the guilty pleas. Any opinion by the court regarding the defendant's bail condition would no longer affect him.

The court does not issue advisory opinions and the court will dismiss an appeal if the issues become moot or so academic that no actual controversy is left to be decided. Although the issue raised in this case is capable of repetition, the court concluded that it could be reviewed if it arises in the future. Merely because an issue may arise in the future does not authorize the court to render a purely advisory opinion. The court did not believe this dispute involved an issue which was likely to be repeated without a meaningful opportunity for judicial review. The defendant's guilty plea made the issue moot, and not time alone.

The court also noted that an appeal of a moot issue will not be dismissed if it involves a question of great public interest and the power and authority of public officials. The court noted the defendant did not initially raise the issue about the constitutionality of the statute but it was raised by the district court on its own initiative without notice to the attorney general and without benefit or briefing by the state or the attorney general. The court noted that its procedure for constitutional adjudication requires deliberate and recent review of statutes, which requires that constitutional claims be properly raised. The court's jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims, which was not followed in this case. The procedure followed by the district court was not conducive to reasoned decision making and, under these circumstances, although there may well be some public interest in this issues in the case that is properly before the court, the court concluded that the defendant's subsequent guilty pleas rendered the issues in the appeal moot and the procedural posture of the case militated against the application of the exceptions to the mootness doctrine.

However, the court did exercise its supervisory jurisdiction to vacate the court's order determining that the requirement for random drug testing as a condition of bail in N.D.C.C. § 19-03.1-46 is unconstitutional. The order was vacated because the district court failed to follow established procedures and orderly process in this case, in recognition of the concern expressed in earlier decisions about one district judge having the final say on the constitutionality of the statute.

APPEAL BY STATE - VOLUNTARY DISMISSAL - UNDERLYING CHARGE

In *State v. Ehli*, 2006 ND 140, ____ N.W.2d ____, the court dismissed the state's appeal from a district court order granting a motion to suppress, finding that the state's appeal was moot.

After hearing, the district court granted the defendant's motion to suppress evidence derived as a result of a DUI checkpoint. On January 17, 2006, the motion to suppress was granted and, on January 18, 2006, the state moved to dismiss citing the trial court's order suppressing evidence. The state's motion was granted on January 20, 2006, and the state filed its notice to appeal.

Citing State v. Grager, 2006 ND 102, 713 N.W.2d 531, the court concluded that the state's dismissal of the cases caused the appeal of the suppression order to be moot. In this case, there was no evidence that the trial court was insisting, after granting the suppression motion, that the cases proceed or be dismissed. The trial court dismissed the cases on the state's motion.

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